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6 Attorneys for Defendant MIDLAND
FUNDING, LLC
7

8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**

10

11 CHARLIE HAUSWIRTH,

12 Plaintiff,

13 v.

14 MIDLAND FUNDING, LLC; LEGAL
RECOVERY LAW OFFICES, INC.;
15 and MARK D. WALSH,

16 Defendants.
17

Case No. 12-CV-0711 DMS (DHB)

**JOINT MOTION FOR
DETERMINATION OF
DISCOVERY DISPUTE**

18 **I. Introduction**

19 The issue before the Court is whether Plaintiff Charlie Hauswirth ("Plaintiff")
20 must provide to Midland Funding LLC ("Midland" or "Defendant") information
21 regarding his banking records in response to Midland's interrogatories.

22 **II. Midland's Position**

23 In this Fair Debt Collection Practices Act ("FDCPA") case, Plaintiff claims
24 that Midland violated the FDCPA when it alleged an account stated cause of action
25 against Plaintiff in a state court debt collection action. Plaintiff's theory is that he
26 never agreed to a final statement of the account and never agreed to a new contract
27 to replace the original credit card agreement, and that Midland's state court
28 complaint was therefore misleading and violated the FDCPA.

1 As part of its defense, Midland is seeking to establish that (1) Plaintiff
2 obtained and used the credit account at issue in the case, (2) that Plaintiff received
3 billing statements on the account, and (3) that Plaintiff never objected to those
4 billing statements—which California courts have held is sufficient support an
5 account stated. *See, e.g., Zinn v. Fred R. Bright Co.*, 271 Cal. App. 3d 597, 600
6 (1969) (“in the usual situation, [an account stated] comes about by the creditor
7 rendering a statement of the account to the debtor. If the debtor fails to object to the
8 statement within a reasonable time, the law implies his agreement that the account is
9 correct as rendered.”).

10 To establish the first two points, Midland served discovery on Plaintiff
11 requesting, among other things, (1) that Plaintiff admit he owned the credit account
12 at issue and used it to purchase goods or services (Request for Admission (“RFA”)
13 Nos. 1 & 2, attached as **Exhibit 1**¹); (2) that Plaintiff admit he received billing
14 statements on the account (RFA No. 5); (3) that Plaintiff state whether he obtained
15 the credit card account at issue (Interrogatory (“Rog”) No. 2, attached as **Exhibit 2**);
16 (4) that Plaintiff state whether he used the credit card to purchase goods or services
17 (Rog No. 3); (5) that Plaintiff state whether he received billing statements for the
18 credit card at issue (Rog No. 5); and (6) that Plaintiff identify the financial accounts
19 he maintained during a specified time period, or from which he made any payment
20 toward any balance due for the credit card at issue (Rog Nos. 8 & 9).

21 In response, Plaintiff (1) denied he had owned or used the account at issue
22 (RFA Nos. 1 & 2); (2) denied received any billing statements on the account (RFA
23 No. 5); (3) claimed he could not say “whether or not he received a credit card with
24

25 ¹ Because Plaintiff reproduced Midland’s requests in his responses, in the interests
26 of brevity and for the Court’s convenience Midland attaches only Plaintiff’s
27 responses. Plaintiff’s Responses to Midland’s Requests for Admissions are attached
28 as **Exhibit 1**; Plaintiff’s Responses to Midland’s Interrogatories are attached as
Exhibit 2.

1 that exact account number” (Rog No. 2); (4) again claimed he could not say
2 “whether or not he received a credit card with that exact account number” (Rog No.
3 3); (5) claimed he could not “say whether he received billing statements for the
4 credit card account” at issue (Rog No. 5); and (6) objected to identifying his
5 financial accounts because the request was “not reasonably calculated to lead to
6 discoverable information” and on grounds of privacy (Rog Nos. 8 & 9).

7 Because Midland has possession of billing records accurately reflecting
8 Plaintiff’s name and address (attached as **Exhibit 3**), Midland believes that
9 Plaintiff’s answers were less than complete. As such, the parties met and conferred
10 on this issue, as well as the identification of the financial accounts, via letter,
11 telephone, and in person.

12 In response to the parties’ meet and confer efforts, Plaintiff’s counsel sent a
13 letter, which is attached as **Exhibit 4**. As relevant to this motion, he stated that:

14 [H]e recalls at one time having an account with Chase. He does not
15 recall the agreement attached as being his. He does not have a specific
16 recollection of making payments in the amount listed, but had a prior
17 history of making minimum monthly payments on similar accounts.
Further, he would make any payments on his accounts, Chase included,
with a money order, so any banking records would not evidence
payment on the account.

18 (Exhibit 3.) Plaintiff has not agreed to provide the financial account information.

19 **Plaintiff’s Financial Account Information Is Discoverable**

20 Plaintiff objected to identifying his financial account on the grounds of
21 relevancy and privacy. Both claims fail.

22 As this Court knows, a party is entitled to discover any nonprivileged matter
23 relevant to any party’s claim or defense. Fed. R. Civ. Proc. 26(b). Particularly in
24 these circumstances, Plaintiff’s banking information is directly relevant to Plaintiff’s
25 claims and Midland’s defenses. If Plaintiff claims he cannot remember whether he
26 owned this account or received account statements, Midland requires another
27 avenue for establishing his ownership of the account. Plaintiff claims he would
28 have made payments with a money order, but Midland is not obligated to take

1 Plaintiff's word on this, particularly in light of his averred lack of memory on other
2 issues. Additionally, even if this were true, if there are money order transactions on
3 the account or withdrawals in the approximate amount of his payments reflected in
4 the billing statements, such information would tend to prove that Plaintiff was
5 making payments on the account, and therefore in fact owned the account, received
6 billing statements, and did not object to them—issues directly relevant to the claims
7 and defenses in this case. Midland has attempted to obtain this information through
8 less intrusive means, but Plaintiff's claimed memory failure has made that attempt
9 futile. Plaintiff claims that these issues can be established through the Original
10 Creditor's billing records—but Midland already has those records, which show that
11 someone with Plaintiff's name and Plaintiff's address owned, used, and made
12 payments on the account. Plaintiff refuses to admit this in discovery, so Midland
13 needs access to Plaintiff's bank records to show that Plaintiff made payments on the
14 account, which tends to prove all of the above.

15 Plaintiff's privacy claim fails as well. Plaintiff has the burden to prove that
16 this information is privileged. *See, e.g., Kelly v. City of San Jose*, 114 F.R.D. 653,
17 662 (N.D. Cal. 1987) ("because privileges operate in derogation of the truth finding
18 process the law places the burden of proving all the elements essential to invoking
19 any privilege on the party seeking its benefits"). He cannot.

20 Federal Rule of Evidence ("FRE") 1101 provides that the rule of evidentiary
21 privilege of the FRE applies to all stages of proceedings before United States district
22 courts. Fed.R.Evid. 1101(a) & (c). Under the FRE, "evidentiary privileges in
23 federal question cases are governed by federal common law." *Dole v. Milonas*, 889
24 F.2d 885, 889 n. 6 (9th Cir.1989) (citing *United States v. Zolin*, 491 U.S. 554, 109
25 S.Ct. 2619, 105 L.Ed.2d 469 (1989); see also *United States v. Hodge and Zweig*,
26 548 F.2d 1347, 1352–53 (9th Cir.1977)). Federal courts do not recognize a right to
27 privacy in banking records. *In re Yassai*, 225 B.R. 478, 483 (Bankr. C.D. Cal. 1998)
28 ("assuming that a state constitution creates 'a right to privacy in financial records,

1 such state privilege[] do[es] not preclude discovery’ of bank records ‘in a federal
2 court suit.’”).

3 Even if there were a recognizable federal privacy interest in banking records,
4 under the federal balancing test applicable to privilege claims, Midland is entitled to
5 discover the information. Resolution of a privacy objection requires a balancing of
6 the need for the information sought against the privacy right asserted. *Perry v. State*
7 *Farm Fire & Cas. Co.*, 734 F.2d 1441, 1447 (11th Cir.1984), *cert. den.* 469 U.S.
8 1108, 105 S.Ct. 784, 83 L.Ed.2d 778 (1985) (requests for court orders for release of
9 information from government agencies should be evaluated by balancing need for
10 disclosure against potential harm to the subject of the disclosure). A carefully
11 drafted protective order minimizes the impact of disclosure and weighs in favor of
12 discovery—even where the privilege at stake is much more compelling than that
13 here. *See Kelly v. City of San Jose*, 114 F.R.D. 653, 662, 666 (N.D. Cal. 1987)
14 (discussing discovery of police procedures and other internal police department
15 documents).

16 As discussed above, Midland attempted to obtain this information through
17 less intrusive means, but Plaintiff’s claimed ignorance has made that attempt futile.
18 And as this Court knows, a protective order already exists in this case, which
19 Plaintiff is free to invoke and which minimizes any potential harm to Plaintiff.
20 Plaintiff’s privacy right—if it even exists in this case—is outweighed by Midland’s
21 legitimate need for this information, especially in light of Plaintiff’s professed
22 inability to recall receiving the billing statements sent to Plaintiff at his admitted
23 address.

24 **III. Plaintiff’s Position**

25 Defendant misunderstands Plaintiff’s legal theory and what is at issue in this
26 case. As Defendant states, Plaintiff alleges that Defendants violated the FDCPA
27 when they stated a cause of action against Plaintiff in state court collection action
28 for an “account stated”. However, despite identifying the issue, Defendant fails to

1 comprehend the underlying argument raised by Plaintiff, i.e. that it was false to
2 allege Account Stated in the state court collection action because the required
3 elements of an account stated were not present.

4 An account stated is a contract which replaces another contract *Mercantile*
5 *Trust Co. v. Doe*, 26 Cal. App. 246, 252 (Cal. App. 1914), *Zinn v. Fred R. Bright*
6 *Co.*, 271 Cal. App. 2d 597, 602 (Cal. App. 4th Dist. 1969). An account stated
7 requires an offer, acceptance, and consideration. Consideration, in the context of
8 account stated, is formed by a compromise between the parties as to the outstanding
9 account balance due from the debtor to the creditor. *Gardner v. Watson* 170 Cal
10 570, 574 (1915). Furthermore, an account stated can only be formed between two
11 parties with a prior relationship, in this case the original creditor and the debtor.
12 *Trafton v. Youngblood*, 69 Cal. 2d 17, 26 (Cal. 1968), *Gleason v. Klamer*, 103 Cal.
13 App. 3d 782, 786-787 (Cal. App. 2d Dist. 1980).

14 Here, Defendant contends that Plaintiff and the original creditor formed an
15 account stated when the original creditor rendered a final billing statement to
16 Plaintiff, which Plaintiff received and did not dispute. While Plaintiff acknowledges
17 that a final billing statement could be the writing which creates an account stated
18 between a consumer and his creditor, in certain, narrow circumstances, Plaintiff
19 does not allege such facts arose in this case.

20 An account stated requires intent of the offering party (the original creditor)
21 to enter into an account stated and thereby waive previous contracts and all terms
22 contained in such preceding contracts. *Coffee v. Williams*, 103 Cal. 550, 556 (Cal.
23 1894). A billing statement could contain the terms of an account stated between the
24 parties, however any writing confirming the creation of an account stated must
25 possess an element of finality. *American Fruit Growers, Inc. v. Jackson*, 203 Cal.
26 748, 751 (Cal. 1928).

27 For the most part, billing statements have nothing to do with an account
28 stated. At best, one billing statement, specifically a final billing statement

1 (commonly referred to as a “charge off statement” in the industry vernacular), might
2 be relevant to establishing an account stated, but even then, this billing statement
3 would only be relevant if it demonstrated, on its face, with clearness and certainty
4 that it was intended by the parties to document a a final settlement up to date, and
5 both parties assented to form an account stated.

6 It is doubtful if the foregoing would, under any view, constitute an
7 independent cause of action as an account stated. An account stated is
8 a document – a writing – which exhibits the state of account between
9 parties and the balance owing from one to the other; and when assented
10 to, either expressly or impliedly, it becomes a new contract. An action
11 upon it is not founded upon the original items, but upon the balance
12 agreed to by the parties. ... **But the account, in order to constitute a
contract, should appear to be something more than a mere
memorandum; it should show upon its face that it was intended to
be a final settlement up to date. And this should be expressed with
clearness and certainty.**

12 *Coffee v. Williams*, 103 Cal. 550, 556 (Cal. 1894) (Bold face added.)

13 This issue was recently addressed in the Southern District of California and
14 Judge Hayes noted that, “In order to constitute an account stated, there must be an
15 “element of finality” to the statement....” *Alaan v. Asset Acceptance LLC*, 2011
16 U.S. Dist. LEXIS 88104, at 24. After *Coffee* was decided, Supreme Court of
17 California again stated this holding:

18 There is in the case before us no element of finality, as the parties were
19 still transacting business. These statements were sent periodically and
20 business was continued between them as before. There is no ground
21 whatever for the contention that the account was rendered and intended
22 to be an account stated, or that said *Osborne*, either expressly or
23 impliedly, considered that it was such.

22 *American Fruit Growers, Inc. v. Jackson*, 203 Cal. 748, 751-752 (Cal. 1928).

23 The issue before the court is whether or not an account stated was formed.
24 Since the parties disagree as to what exactly is required to form an account stated,
25 the documents and discovery should be focused on that issue only.

26 This discovery dispute is based on Defendant requesting all of Plaintiff’s
27 personal financial records from which a payment may have been made on this
28 alleged account. Defendant claims that it needs Plaintiff’s highly confidential bank

1 records to “establish through Plaintiff’s financial records that Plaintiff made
2 payments to the Original creditor,” and to then “match Plaintiff’s payment to
3 payments reflecting in billing statements” which would “tend to prove the Plaintiff
4 in fact owed the accounts, received billing statements, and did not object to them.”
5 Defendant hopes to use this fishing expedition to discover information necessary to
6 establish the formation of an account stated.

7 Whether Plaintiff had the account with the original creditor is almost
8 irrelevant here, and whether payments were made to the original creditor doesn’t
9 come anywhere near establishing an account stated. However, there is a better and
10 less intrusive way to get the information. *Jackson v. Unisys, Inc.*, 2009 U.S. Dist.
11 LEXIS 121716 (E.D. Pa. Dec. 31, 2009) (Information should be gleaned from less
12 intrusive methods in an effort to protect a person’s privacy interest in his tax
13 returns.) See also, *United States v. O. K. Tire & Rubber Co.*, 71 F.R.D. 465 (D.
14 Idaho 1976)

15 With this in mind, the first question that should be asked is this- how does
16 discovery of Plaintiff’s personal and confidential bank records establish an account
17 stated? It is difficult to imagine how Plaintiff’s bank records could be used as a
18 means to reach this end. Any information needed to establish Defendant’s
19 “defense” can be obtained from the original creditor. The obvious, best, and least
20 intrusive approach here is for Defendant to simply go to the original creditor and
21 say, “You claim there was an account stated here based on a final billing statement,
22 provide us with a copy of that final statement along with any payments made by Mr.
23 Hauswirth on the account.” Not only would this be less intrusive than divulging
24 Plaintiff’s personal and confidential bank records, it would allow the parties to
25 examine the writing which Defendants claim exists, and for which Defendants rely
26 on so heavily for their defense. Plaintiff has previously tried to schedule a deposition
27 and request documents from the original creditor in this case, but Defendant has
28 balked at every opportunity. Instead, Defendant insists that Plaintiff turn over all of

1 her private financial records. Plaintiff believes these records to be irrelevant and not
2 leading to other admissible evidence. In light of this issue and being unable to
3 resolve the dispute, Plaintiff is in the process of setting a deposition and production
4 of documents from the original creditor in late March of 2013.

5 In *Rolscreen Co. v. Pella Prods. of St. Louis, Inc.*, 145 F.R.D. 92 (S.D. Iowa
6 1992), the court held that before a defendant would be permitted to depose
7 plaintiff's president, it would be required to first depose other employees whom
8 plaintiff asserted had more personal knowledge of underlying facts of dispute. That
9 is similar to the issue at hand. Defendant should not be allowed to engage in such
10 an expansive fishing expedition into Plaintiff's personal financial records when
11 there are less intrusive and more efficient means to gather the information
12 Defendant seeks.

13 By going directly to the original creditor and inquiring as to whether the
14 original creditor rendered such a final billing statement to the plaintiff and whether
15 the original creditor actually intended any statement rendered to constitute account
16 stated, the issue here will be narrowed (if not eliminated) to the point where any
17 examination of Plaintiff's billing records will be restricted to a very narrow window
18 of time.

19 Merely claiming that the original creditor *might have* sent out "billing
20 statements," and one of these billing statements *might have* contained an "element
21 of finality," which in turn the original creditor *might have* relied upon to form
22 account stated which Plaintiff *might have* paid, does not establish cause to intrude
23 upon Plaintiff's highly confidential bank records. Defendant could, *instead*, merely
24 subpoena from the original creditor the one final billing statement Defendant hopes
25 to rely upon.

26 Further, one, and only one, billing statement could possibly be relevant; the
27 one that contained an "element of finality." *Alaan v. Asset Acceptance LLC*, 2011
28 U.S. Dist. LEXIS 88104. And even that one billing statement is irrelevant unless it

1 “show[s] upon its face that it was intended to be a final settlement up to date ... with
2 clearness and certainty.” *Coffee v. Williams*, 103 Cal. 550, 556 (Cal. 1894).
3 Defendant cannot use the mere possibility that such a billing statement may exist to
4 justify its desired fishing expedition.

5 If the defendant is suggesting that one of these billing statements was the
6 “final” billing statement, which contained an “element of finality” to it, Defendant
7 should produce that billing statement so that it can first be examined to determine
8 whether such statement contained an element of finality. Presumably Defendant has
9 the billing statement that it claims created this account stated; it did, after all, sue
10 Plaintiff based on that theory in state court. Once produced, the court can determine
11 whether the final billing statement contains an element of finality, and if so, which
12 bank records are needed to resolve this issue and narrow any intrusion into
13 Plaintiff’s financial records.

14 **IV. Declaration of Compliance with Meet and Confer Requirements Under**
15 **Civil Local Rule 26.1.a.**

16 Counsel for the parties met in person on Tuesday, January 22, 2013, to
17 discuss the above outstanding discovery issues, and were unable to come to an
18 agreement regarding production of Plaintiff’s bank records.

19 ///

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27 ///

28 ///

1 DATED: February 15, 2013

Respectfully submitted,

2 SOLOMON WARD SEIDENWURM &
3 SMITH, LLP

4
5 By: s/Thomas F. Landers

6 THOMAS F. LANDERS

7 LEAH S. STRICKLAND

8 Attorneys for Defendant MIDLAND
FUNDING, LLC

9 DATED: February 15, 2013

HYDE & SWIGART

10
11 By: s/Joshua B. Swigart

12 JOSHUA B. SWIGART

13 ROBERT L. HYDE

14 Attorneys for Plaintiff CHARLIE
HAUSWIRTH

15
16
17 **Signature Certification**

18 Pursuant to Section 2(f)(4) of the Electronic Case Filing Administrative
19 Policies and Procedures Manual, I hereby certify that the content of this document is
20 acceptable to Joshua B. Swigart, counsel for plaintiff, and that I have obtained Mr.
21 Swigart's authorization to affix his electronic signature to this document.

22 s/ Thomas F. Landers

23 THOMAS F. LANDERS

EXHIBIT 1

Joshua B. Swigart, Esq. (SBN: 225557)
josh@westcoastlitigation.com
Robert L. Hyde, Esq. (SBN: 227183)
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Attorneys for Plaintiff, Charlie Hauswirth

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

Charlie Hauswirth	Case No: 12-CV-00711 DMS (DHB)
Plaintiff,	
v.	PLAINTIFF CHARLIE HAUSWIRTH'S RESPONSES TO DEFENDANT MIDLAND FUNDING, LLC'S REQUESTS FOR ADMISSION, SET ONE
Midland Funding, LLC, Legal Recovery Law Offices, Inc., and Mark D. Walsh	
Defendant.	

PROPOUNDING PARTY: **DEFENDANT, MIDLAND FUNDING, LLC**
RESPONDING PARTY: **PLAINTIFF, CHARLIE HAUSWIRTH**
SET NO.: **ONE**

**TO DEFENDANT MIDLAND FUNDING, LLC, AND ITS
ATTORNEYS OF RECORD:**

COMES NOW Plaintiff, **CHARLIE HAUSWIRTH'S**, by and through counsel,
hereby responds as follows to Defendant **MIDLAND FUNDING LLC'S**
REQUESTS FOR ADMISSION to Plaintiff, heretofore filed in this case, without
in any way waiving or intending to waive, but on the contrary intending to reserve
and reserving:

(a) All questions and objections as to competency, relevancy, materiality, privilege admissibility as evidence for any purpose in any subsequent proceeding in, or the hearing of this action, of any of these answers or the subject matter thereof;

(b) The right to object to the use of any of said answers, or the subject matter thereof, in any subsequent proceeding, in or the hearing of this action, on any grounds;

(c) The right to object on any grounds or at any time to demand for further response to these or other discovery documents or other discovery procedures involved or related to the subject matter of the requests for admissions herein answered; and

(d) The right at any time, to revise, correct, add to or clarify any of said answers propounded herein.

REQUESTS FOR ADMISSION

REQUEST FOR ADMISSION NO 1:

Admit YOU had a credit card account bearing account no. 4018040019787686. "YOU," "YOUR" or "HAUSWIRTH" mean CHARLIE HAUSWIRTH and his agents and any PERSON acting on his behalf.

The terms "PERSON" or "PERSONS" mean all individuals and entities of any form including a natural person, firm, association, organization, partnership, business, trust, corporation, joint venture, or public entity and their agents, employees, representatives and any other persons acting on their behalf.

RESPONSE TO REQUEST FOR ADMISSION NO 1:

Deny.

REQUEST FOR ADMISSION NO 2:

Admit YOU used the credit card account bearing account no. 4018040019787686 to purchase goods or services.

RESPONSE TO REQUEST FOR ADMISSION NO. 2:

1 Deny.

2 **REQUEST FOR ADMISSION NO 3:**

3 Admit YOU incurred a balance on the credit card account bearing account
4 no. 4018040019787686.

5 **RESPONSE TO REQUEST FOR ADMISSION NO. 3:**

6 Deny.

7 **REQUEST FOR ADMISSION NO 4:**

8 Admit that YOU failed to pay in full the balance due for the credit card
9 account bearing the account no. 4018040019787686.

10 **RESPONSE TO REQUEST FOR ADMISSION NO. 4:**

11 Deny.

12 **REQUEST FOR ADMISSION NO 5:**

13 Admit YOU received billing statements for the credit card account bearing
14 account no. 4018040019787686.

15 **RESPONSE TO REQUEST FOR ADMISSION NO. 5:**

16 Deny.

17 **REQUEST FOR ADMISSION NO 6:**

18 Admit that YOU never objected in writing to any billing statement YOU
19 received for the credit card account bearing account no. 4018040019787686.

20 **RESPONSE TO REQUEST FOR ADMISSION NO. 6:**

21 Admit.

22 **REQUEST FOR ADMISSION NO 7:**

23 Admit YOU received the billing statement attached hereto as Exhibit 1.

24 **RESPONSE TO REQUEST FOR ADMISSION NO. 7:**

25 Upon a reasonable inquiry, Plaintiff lacks sufficient information to admit or
26 deny the matter stated in the request. Discovery and investigation are ongoing..

27 **REQUEST FOR ADMISSION NO 8:**

28 Admit YOU never objected in writing to the billing statement attached hereto
as Exhibit 1.

1 **RESPONSE TO REQUEST FOR ADMISSION NO. 8:**

2 Deny.

3 **REQUEST FOR ADMISSION NO 9:**

4 Admit YOU never objected orally to the billing statement attached hereto as
5 Exhibit 1.

6 **RESPONSE TO REQUEST FOR ADMISSION NO. 9:**

7 Upon a reasonable inquiry, Plaintiff lacks sufficient information to admit or
8 deny the matter stated in the request. Discovery and investigation are ongoing.

9 **REQUEST FOR ADMISSION NO 10:**

10 Admit YOU failed to pay the balance due shown on the billing statement
11 attached hereto as Exhibit 1.

12 **RESPONSE TO REQUEST FOR ADMISSION NO. 10:**

13 Deny.

14
15
16
17 Dated: November 15, 2012

Hyde & Swigart

18
19 By: _____

Joshua B. Swigart
Attorneys for Plaintiff

Charlie Hauswirth
v.
Midland Funding, LLC, Legal Recovery
Law Offices, Inc., and Mark D. Walsh

Court Name: UNITED STATES DISTRICT COURT, SOUTHERN
DISTRICT OF CALIFORNIA

Case No.: 12-CV-0711-DMS-DHB

VERIFICATION

I am the Plaintiff in the above-captioned matter. I am familiar with the contents of the foregoing:

- **PLAINTIFF CHARLIE HAUSWIRTH'S RESPONSES TO
DEFENDANT MIDLAND FUNDING, LLC'S REQUESTS FOR
ADMISSIONS, SET ONE**

The information supplied therein is based on my own personal knowledge and/or has been supplied by my attorneys or other agents and is therefore provided as required by law. The information contained in the foregoing document is true, except as to the matters, which were provided by my attorneys or other agents, and as to those matters, I am informed and believe that they are true.

I declare, under the penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on 10-23-12, at San Diego, CA
(Date) (City, State)

Charlie Hauswirth
Charlie Hauswirth

EXHIBIT 2

Joshua B. Swigart, Esq. (SBN: 225557)
josh@westcoastlitigation.com

Robert L. Hyde, Esq. (SBN: 227183)
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Attorneys for Plaintiff, Charlie Hauswirth

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

Charlie Hauswirth	Case No: 12-CV-00711 DMS (DHB)
Plaintiff,	
v.	PLAINTIFF CHARLIE HAUSWIRTH'S RESPONSES TO DEFENDANT MIDLAND FUNDING, LCC'S INTERROGATORIES, SET ONE
Midland Funding, LLC, Legal Recovery Law Offices, Inc., and Mark D. Walsh	
Defendants.	

PROPOUNDING PARTY:

DEFENDANT, MIDLAND FUNDING, LLC

RESPONDING PARTY:

PLAINTIFF, CHARLIE HAUSWIRTH

SET No.:

ONE

**TO DEFENDANT MIDLAND FUNDING, LLC, AND ITS
ATTORNEYS OF RECORD:**

COMES NOW Plaintiff, **CHARLIE HAUSWIRTH'S**, by and through counsel,
hereby responds as follows to Defendant **MIDLAND FUNDING LLC'S**
SPECIAL INTERROGATORIES to Plaintiff, heretofore filed in this case, without
in any way waiving or intending to waive, but on the contrary intending to reserve
and reserving:

(a) All questions and objections as to competency, relevancy, materiality, privilege admissibility as evidence for any purpose in any subsequent proceeding in, or the hearing of this action, of any of these answers or the subject matter thereof;

(b) The right to object to the use of any of said answers, or the subject matter thereof, in any subsequent proceeding, in or the hearing of this action, on any grounds;

(c) The right to object on any grounds or at any time to demand for further response to these or other discovery documents or other discovery procedures involved or related to the subject matter of the special interrogatories herein answered; and

(d) The right at any time, to revise, correct, add to or clarify any of said answers propounded herein.

INTERROGATORIES

INTERROGATORY NO. 1:

State all residential addresses YOU maintained from January 1, 2002 to the present, including the dates YOU resided at each.

"YOU," "YOUR" or "HAUSWIRTH" mean CHARLIE HAUSWIRTH and her agents and any PERSON acting on her behalf.

The terms "PERSON" or "PERSONS" mean all individuals and entities of any form including a natural person, firm, association, organization, partnership, business, trust, corporation, joint venture, or public entity and their agents, employees, representatives and any other persons acting on their behalf.

RESPONSE TO INTERROGATORY NO 1:

7969 Golden Avenue, Lemon Grove, CA 91945.

INTERROGATORY NO. 2:

State whether YOU obtained a credit card account bearing account no. 4018040019787686.

1
2 **RESPONSE TO INTERROGATORY NO. 2:**

3 Plaintiff cannot say whether or not he received a credit card with that exact
4 account number. Discovery and investigation are continuing. Plaintiff reserves the
5 right to supplement this response.

6 **INTERROGATORY NO. 3:**

7 State whether YOU used the credit card account bearing account no.
8 4018040019787686 to purchase goods or services.

9 **RESPONSE TO INTERROGATORY NO. 3:**

10 Plaintiff cannot say whether or not he received a credit card with that exact
11 account number. Discovery and investigation are continuing. Plaintiff reserves the
12 right to supplement this response.

13 **INTERROGATORY NO. 4:**

14 State whether YOU used the credit card account bearing account no.
15 4018040019787686 in connection with operating a business?

16 **RESPONSE TO INTERROGATORY NO. 4:**

17 No. Plaintiff did not use any credit card he is aware of in connection with
18 operating a business.

19 **INTERROGATORY NO. 5:**

20 State whether YOU received billing statements for the credit card account
21 bearing account no. 4018040019787686.

22 **RESPONSE TO INTERROGATORY NO. 5:**

23 Plaintiff cannot say whether he received billing statements for the credit card
24 account bearing account no. 4018040019787686. Discovery and investigation are
25 continuing. Plaintiff reserves the right to supplement this response.

26 **INTERROGATORY NO. 6:**

27 If YOU received billing statements for the credit card account bearing
28 account no. 5176690012519711, IDENTIFY all instances in which YOU sent a
written objection to the ORIGINAL CREDITOR RELATING to the balance shown

1 on the billing statement.

2 "IDENTIFY" when used with respect to a PERSON shall mean to provide
3 the name, last known address and last known telephone number of the PERSON.
4 When used with respect to a DOCUMENT, it shall mean to provide a description of
5 the DOCUMENT (including date and title, where applicable) sufficiently specific
6 to enable a request for production, together with the current location of the
7 DOCUMENT. When used in reference to an event, means to give specific details
8 for the event, including without limitation, dates, times, circumstances and
9 PERSONS present or participating.

10 "DOCUMENT" or "DOCUMENTS" mean any and all other writings as
11 defined in Federal Rule of Evidence 1001. It includes also any email and
12 electronically stored information ["ESI," Fed.R.Civ.P. 34(a)(1)(A)], accessible or
13 inaccessible, on magnetic or optical storage media, whether as active files,
14 "deleted" files, backup files, file fragments, or slack.

15 "ORIGINAL CREDITOR" means and is defined herein as the party who
16 initially offered credit to Plaintiff on the account that is the subject of the STATE
17 COURT COMPLAINT.

18 STATE COURT COMPLAINT" means the matter entitled Midland Funding,
19 LLC v. Charlie Hauswirth, Superior Court of California for the County of San
20 Diego case number 37-2010-70826-CL-CL-EC.

21 **RESPONSE TO INTERROGATORY NO. 6:**

22 Plaintiff never sent in any written objections.

23 **INTERROGATORY NO. 7:**

24 If YOU received billing statements for the credit card account bearing
25 account no. 4018040019787686, IDENTIFY all instances in which YOU objected
26 orally to the ORIGINAL CREDITOR RELATING to the balance shown on the
27 billing statement.

28 **RESPONSE TO INTERROGATORY NO. 7:**

Plaintiff called Original Creditor once, but cannot speak to the specific

1 details of that telephone call or if it was in relation to account no.
2 4018040019787686.

3 **INTERROGATORY NO. 8:**

4 IDENTIFY all FINANCIAL ACCOUNTS YOU maintained from January 1,
5 2002 to the present.

6 "FINANCIAL ACCOUNTS" means any banking, checking, savings, credit
7 union account, or any other account in which YOU maintained funds, or in which
8 funds were maintained on YOUR behalf, or other account containing funds to
9 which YOU had access, but excluding retirement accounts.

10 **RESPONSE TO INTERROGATORY NO. 8:**

11 Objection. Plaintiff's financial accounts are not reasonably calculated to lead
12 to discoverable information and invades Plaintiff's privacy. Plaintiff will not be
13 providing this information.

14 **INTERROGATORY NO. 9:**

15 IDENTIFY all FINANCIAL ACCOUNTS from which YOU made any
16 payment toward any balance due for the credit card account bearing the account no.
17 4018040019787686.

18 **RESPONSE TO INTERROGATORY NO. 9:**

19 Objection. Plaintiff's financial accounts are not reasonably calculated to lead
20 to discoverable information and invades Plaintiff's privacy. Plaintiff will not be
21 providing this information.

22 **INTERROGATORY NO. 10:**

23 State why YOU failed to pay the balance due in full for the credit card
24 account bearing the account no. 4018040019787686.

25 **RESPONSE TO INTERROGATORY NO. 10:**

26 Plaintiff does not recall the exact account numbers of the credit cards he has
27 had and cannot state whether he paid the full balance. If he did pay the full balance
28 he can not state why he did not pay the full balance. Discovery and investigation
are continuing. Plaintiff reserves the right to supplement this response.

HYDE & SWIGART
San Diego, California

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Dated: November 15, 2012

Hyde & Swigart

By: _____
Joshua B. Swigart
Attorneys for Plaintiff

Charlie Hauswirth
v.
Midland Funding, LLC, Legal Recovery
Law Offices, Inc., and Mark D. Walsh

Court Name: UNITED STATES DISTRICT COURT, SOUTHERN
DISTRICT OF CALIFORNIA

Case No.: 12-CV-0711-DMS-DHB

VERIFICATION

I am the Plaintiff in the above-captioned matter. I am familiar with the contents of the foregoing:

- **PLAINTIFF CHARLIE HAUSWIRTH'S RESPONSES TO
DEFENDANT MIDLAND FUNDING, LLC'S
INTERROGATORIES, SET ONE**

The information supplied therein is based on my own personal knowledge and/or has been supplied by my attorneys or other agents and is therefore provided as required by law. The information contained in the foregoing document is true, except as to the matters, which were provided by my attorneys or other agents, and as to those matters, I am informed and believe that they are true.

I declare, under the penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on 10-23-12, at SAN DIEGO, CA.
(Date) (City, State)

Charlie Hauswirth
Charlie Hauswirth

1 *Hauswirth v. Midland Funding, LLC, Legal Recovery Law Offices, Inc. & Mark D. Walsh*
2 *United States District Court for the Southern District of California*
3 *12-CV-00711-DMS-DHB*

4 **PROOF OF SERVICE**

5 I, Brittney Miller, declare as follows:

6 I am over the age of eighteen years and not a party to the case. I am employed in the County of San Diego, California,
7 where the mailing occurs. My business address is 411 Camino del Rio South, Suite 301, San Diego, CA, 92108. I am
8 readily familiar with our business' practice of collecting, processing, and mailing of correspondence and pleadings for
9 mail with the United States Postal Service.

10 On November 15, 2012, I served the foregoing document(s) described as:

11 **Plaintiff's Responses to Defendant Midland Funding, LLC's Requests for Admissions, Set One**
12 **Plaintiff's Responses to Defendant Midland Funding, LLC's Requests for Production of Documents, Set One**
13 **Plaintiff's Responses to Defendant Midland Funding, LLC's Interrogatories, Set One**
14 **Verification of Plaintiff's Responses to Defendant Midland Funding, LLC's Requests for Admissions, Set One**
15 **Verification of Plaintiff's Responses to Defendant Midland Funding, LLC's Requests for Production of**
16 **Documents, Set One**
17 **Verification of Plaintiff's Responses to Defendant Midland Funding, LLC's Interrogatories, Set One**

18 On the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope as follows:

19 Midland Funding, LLC


20 Thomas F. Landers
21 Leah S. Strickland
22 Solomon Ward Seidenwurm & Smith, LLP
23 401 B. Street, Suite 1200
24 San Diego CA 92101

25 Legal Recovery Law Offices, Inc. & Mark D. Walsh

26 David Cotter
27 Legal Recovery Law Offices, Inc.
28 5030 Camino De La Siesta # 340
San Diego CA 92108

[X] BY OVERNIGHT MAIL, by placing a copy thereof in a separate envelope for each addressee named above,
addressed to each addressee respectively, and then sealed each envelope and, with the postage fully prepaid,
deposited each in the Overnight delivery receptacle mail at Riverside, California in accordance with our
business' practice.

I declare under penalty under perjury under the laws of the State of California that the foregoing is true and correct.
Executed on November 15, 2012, at San Diego, California.


Brittney Miller

Proof of Service

EXHIBIT 3

01/17/08 \$4628.20 \$4628.20 SITE:KC-CL TM:CO-5000 ACID:ROB1242
 PAY DUE DATE PAY AMOUNT PAY AMT 000 04/05/12 11:57:20

CHARLIE B HAUSWIRTH
 7967 GOLDEN AVE
 LEMON GROVE
 91945-1811000

CA

CITI CARDS
 PROCESSING CENTER
 DES MOINES, IA
 50363-0001

Citi® Platinum Select® Card



Account Number
 4018 0400 1978 7686

Customer Service:

1-800-382-3334

PO BOX 142319

IRVING, TX

75014-2319

Total Credit Line	Available Credit Line	Cash Advance Limit	Available Cash Limit	New Balance
\$3880	\$0	\$2800	\$0	\$4628.20
Statement/ Closing Date	Amount Over Credit Line	Past Due	Purch/Adv Minimum Due	Minimum Amount Due
12/24/2007	\$748.20	\$991.55	\$167.13	\$4628.20

Sale Date	Post date	Reference Number	Activity Since Last Statement	Amount
12/24			Standard Purch PURCHASES*FINANCE CHARGE*PERIODIC RATE 84 0000 0	37.71 700000000000
12/24			Purch/Adv Thru 12/23/2005 PURCHASES*FINANCE CHARGE*PERIODIC RATE 84 0000 0	83.42 700000000000

Help is available! Please call the toll-free number shown above to learn about our special payment options. Call Monday - Friday, 7 am to 9 pm, or Saturday, 8 am to 5 pm, Central Time. Please give us the opportunity to assist you.

Account Summary	Previous Balance	(+) Purchases & Advances	(-) Payments & Credits	(+) FINANCE CHARGE	(=) New Balance
PURCHASES	\$4,507.07	\$0.00	\$0.00	\$121.13	\$4,628.20
ADVANCES	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
TOTAL	\$4,507.07	\$0.00	\$0.00	\$121.13	\$4,628.20

Rate Summary	Balance Subject to Finance Charge	Periodic Rate	Nominal APR	ANNUAL PERCENTAGE RATE
PURCHASES				
Standard Purch	\$1,421.21	0.00559%(D)	31.240%	31.240%
Purch/Adv Thru 12/23/2005	\$3,144.20	0.08559%(D)	31.240%	31.240%
ADVANCES				
Standard Adv	\$0.00	0.08559%(D)	31.240%	31.240%

MF-HAU000014

EXHIBIT 4

HYDE & SWIGART
Attorneys at Law

SAN DIEGO, CA	411 Camino Del Rio South, Suite 301 San Diego, CA 92108
SAN FRANCISCO, CA	
RIVERSIDE, CA	T (619) 233-7770
ORANGE, CA	F (619) 297-1022
PHOENIX, AZ	www.westcoastlitigation.com
Attorney Bar Licenses: Robert L. Hyde (CA & MN) Joshua B. Swigart (CA & DC) David J. McGlothlin (AZ & CA) Andrea Darrow Smith (CA) Desiree D. Nguyen (CA)	

January 31, 2013

Thomas F. Landers
Leah S. Strickland
SOLOMON WARD
401 B. Street, Suite 1200
San Diego CA 92101
tlanders@swsslaw.com
lstrickland@swsslaw.com

RE: Your Previous Correspondence Concerning the Acosta v. Midland Funding, LLC, Legal Recovery Law Office, Inc, and Mark Walsh and other Related Cases

Dear Counsel:

This is a letter to summarize what changes if any will be made by our clients discovery responses regarding issues you raised in your meet and confer letter and our meeting following. My understanding from our meeting is that you request supplemental responses from the following plaintiffs; Maria Real, Charlie Hauswirth, Bradley Vogt, and Suzan Tapp. We have conferred with all four of the above listed Plaintiffs and below is what additional information we can provide. spoke with them and reviewed the documentation in detail.

Plaintiff Maria Real

Ms. Real does not recognize any of the document provided by Midland and/or the alleged original creditor HSBC. She cannot state with any certainty that the alleged account is her account. Ms. Real would testify in a deposition that she does not recall opening a HSBC account. It is difficult to go into any detail with her concerning the alleged account, as your client has not provided any statements with transaction detail. As Ms. Real does not recall this account and HSBC has submitted a declaration that no account existed, there is nothing to supplement. If you desire to take Ms. Real's deposition, please advise. The creditor documentation including that from HSBC

Plaintiff Charlie Hauswirth

Mr. Hauswirth has further reviewed the documents supplied by your client. After a further review he recalls at one time having an account with Chase. He does not recall the agreement attached as being his. He does not have a specific recollection of making payments in the amount listed, but had a prior history of making minimum monthly payments on similar accounts. Further, he would make any payments on his accounts, Chase included, with a money order, so any banking records would not evidence payment on the account. Please advise if you would like Mr. Hauswirth to supplement any responses and/or have his deposition taken.

Plaintiff Bradley Vogt

Mr. Vogt further reviewed the documents provided by your office. He has no recollection of the account and believes that the account may have been opened by someone else using his identify and does not recognize any of

the listed charges. Mr. Vogt would testify that he had no knowledge of the account until he was sued by your client. The address present on the statement is not his mailing address, but an address used for his employer's headquarters. He has never received statements on this alleged account or other mail at this address. Additionally, any mail received at this address was never forwarded to him. Mr. Vogt reviewed the signature on the application card and believes someone forged his signature. If you want Mr. Vogt to supplement these responses and/or take his deposition, please let me know.

Plaintiff Tapp

Ms. Tapp is currently in Turkey and our office has been unable to reach her for a further phone interview concerning the issues you raised. We are in the process of setting a time to discuss this matter, but as of the date of this letter, we have nothing to supplement for Ms. Tapp.

As we discussed, I am open to having any or all of my client's sit for a deposition. We would request that a 30(b)(6) witness be identified and scheduled from your side to correspond with each Plaintiff's deposition. I believe we have previously noticed depositions, but had postponed them due to a further agreement. Please let me know with regard to this issue.

Sincerely,

/s/Joshua B. Swigart